***THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

WRIT PETITION Nos. 9189 of 2004, 20283 OF 2005 AND C.C.NO.23 OF 2005

\+ **W.P.No.0189 of 2004**

% Dated 29.09.2005

No.139761 48-H Nk N/Asst/Atal Bihari Acharya Military Hospital Secunderabad A.P.

…….. Petitioner

$ The Senior Registrar & Officer Commanding Troops Military Hospital, Secunderabad A.P. & others.

…… Respondent

! Counsel for Petitioners : Capt. K.M.Saxena

^ Counsel for Respondents : Mr.Deepak Bhattacharjee

< GIST:

> HEAD NOTE:

? Cases referred

[1] CDJ 2002 SC 336

[2] MIL. L.J. 1999 SC 145

[3] Judgment in W.P.No.4738 of 2003, dated 17.11.2003

[4] AIR 1960 MP 155

[5] 2004 (5) SCC 518

[6] AIR 1970 BOMBAY 333 (DB)

[7] AIR 1949 MADRAS 547 (FB)

[8] AIR 1954 MADRAS 833 (DB)

[9] 1973 (2) All E.R. 513

[10] AIR 1964 SC 207

[11] AIR 1987 SC 1646

[12] AIR 1961 SC 1762

[13] AIR 1969 SC 414

[14] AIR 1971 SC 500

[15] AIR 1965 SC 247

[16] 1992(2) SCC 36

[17] AIR 1982 SC 1413

[18] AIR 1998 SC 1855

[19] AIR 1999 SC 880

[20] (2000) 3 SCC 171

[21] (2001) 7 SCC 530

[22] (2001) 3 SCC 739

THE HON'BLE MR JUSTICE RAMESH RANGANATHAN

W.P.Nos.9189 OF 2004, 20283 OF 2005 AND C.C.No.23 OF 2005

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COMMON ORDER:

W.P.No.9189 of 2004 is filed to declare the action of the first respondent, (Senior Registrar & Officer Commanding Troops, Military Hospital, Secunderabad), in issuing charge sheet against the petitioner, under Section 69 of the Army Act 1950 read with Section 354 I.P.C., on the basis of the complaint dated 19.01.2004 filed by the third respondent (Mrs.Roshni, W/o. Craftsman V.K.Saroj), as without jurisdiction, mala fide, biased and in violation of Articles 14 and 16 of the Constitution of India.

The petitioner, by way of an interlocutory application in the said writ petition,

had sought for a direction to the first respondent to stay all further proceedings pursuant to the complaint dated 19.01.2004 lodged by the third respondent, and the consequential charge sheet issued to him. This Court, by order in WPMP.No.11806 of 2004 in W.P.No.9189 of 2004 dated 18.5.2004, directed the respondents not to pass any final orders. Alleging violation of the order, in WPMP.No.11806 of 2004 in W.P.No.9189 of 2004 dated 18.05.2004, C.C.No.23 of 2005 was filed. Questioning the action of the first respondents in not permitting the petitioner to avail his entitlement to annual leave of 60 days, standing to his credit for the calendar year 2005, as being violative of his fundamental rights under Articles 14, 16 and 21 of the Constitution of India, W.P.No.20283 of 2005 was filed before this Court.

Since all the three cases, (W.P.No.9189 of 2004, C.C.No.23 of 2005 and W.P.No.20283 of 2005), relate to the same incident and are based on the action initiated against the petitioner, under Section 69 of the Army Act read with Section 354 I.P.C., they were heard together and are being disposed of by this common order.

The parties shall hereinafter be referred to as they are arrayed in W.P.No.9189 of 2004.

Facts, to the extent necessary for this writ petition, are that the petitioner was enrolled in the Army Medical Corps on 26.02.1988 and after completing more than 16 years of service, was posted as a Nursing Assistant in the Military Hospital, Secunderabad, on 16.12.2002, whereat he was entrusted with the duties of Ward Master of Family Ward II. On 19.01.2004 when he was on duty, between 08.00 hrs and 16.00 hrs, in the guise of examination, the petitioner is said to have used criminal force and to have invaded the private parts of the third respondent, who had been admitted to the Family Ward, thereby violating her dignity. Under the charter of duties of a Ward Master, the petitioner should not have examined any female patient. Para 51, of the Regulation for medical services of Armed Forces, stipulates that examination of a female patient should be conducted in the presence of a nurse or a female attendant and in an emergency, when a female attendant is not available, the husband of the patient and another male attendant is to be present during examination and consent of the patient obtained even for their presence. The regulations further require the Medical Assistant not to take part in intimate nursing procedure on female

patients and if it is necessary to administer treatment, to a female patient, the medical assistant is not to be left alone with the patient.

The petitioner, as Ward Master, is alleged to have taken advantage of his position and to have invaded the private parts of the third respondent in the guise of medical examination and thereby to have committed an offence under Section 69 of the Army Act, 1950, read with Section 354 I.P.C. Since the petitioner was subject to Army rules and regulations a Court of Inquiry was appointed which, after due consideration of the evidence, recommended initiation of disciplinary proceedings against him. In exercise of the powers under Section 101 of the Army Act read with para 392 (k) of the Army Regulations, the petitioner was taken into Army custody on 06.01.2005 for initiating summary court martial. The petitioner was issued a charge sheet, as under:

"at Secunderabad, on 19 Jan. 2004, while performing the duties of ward master of Family Ward-II of MH, Secunderabad used criminal force to Mrs.Roshni Saroj, W/o.No.14626041P Cfn V.K.Saroj, by palpating her abdomen and touching her private parts, intending thereby to outrage her modesty."

The Commander, Andhra Sub-Area, recommended trial of the petitioner by a summary court martial on 01.12.2004 and accordingly the court martial was commenced from 11.01.2005 onwards. The petitioner pleaded not guilty before the summary court martial and the procedure prescribed, in cases where a plea of 'not guilty' is taken, was followed by the respondents.

It is the case of the respondents that the petitioner did not choose to cross-examine any of the prosecution witnesses including the complainant, that the Court Martial after appreciation of the evidence, both oral and documentary, came to the conclusion that the petitioner was guilty of the charge levelled against him and accordingly imposed rigorous imprisonment for nine months in civil prison, reduction in rank and dismissal from service. However, in compliance with the interim orders of this Court, the punishment was not given effect to.

In so far as the petitioner's request for grant of leave is concerned, which is the subject matter of challenge in W.P.No.20283 of 2005, respondents would

contend that while they did not pass any final orders, in compliance with the interim orders of this Court, the petitioner could not be sanctioned leave in the absence of any provision for sanction of leave to a person who had been sentenced to undergo rigorous imprisonment for nine months.

Capt. K.M.Saxena, learned counsel for the petitioner, would submit the following questions of law for the consideration of this Court:-

(a) Whether there is any rationale in denying to the petitioner his right to Annual Leave / Casual Leave to enable him attend to his ailing mother?

(b) Whether an Army Authority/Army Officer has jurisdiction to entertain a First Information Report by a civilian regarding commission of a Civil Offence?

(c) Whether concerned Army Authority is competent to investigate a civil offence committed against the personae or property of a civilian not subject to Army Act?

(d) Whether concerned Army Authority is competent to usurp the jurisdiction of the Magistrate and frame charges in a case where civilians and army personnel both are involved?

(e) Whether concerned Army Authority is competent to proceed with the trial of a person for a civil offence just because that person happens to be subject to Army Act?

(f) Whether concerned Amy Authority is competent to proceed with the case against a soldier on the same set of facts which are already before a court of Magistrate on the basis of a properly instituted complaint by that person under the provisions of Code of Criminal Procedure, 1973.

(g) What is the scope and ambit of AA Section 69?

(h) Does subjection to Army Act, deprive a soldier accused of a civil offence of his statutory protections available to him under civil law, when he is tried by a Military Tribunal?

(i) Whether procedure before a Court Martial is similar to and as conducive to legal protections available to the accused under civil court?

(j) Whether there was any infirmity in the procedure adopted by the Army Authorities in the case of the petitioner which strike at the very roots of concept of fair trial?

(k) To what relief?

Questions (b) to (i):

These questions, all of which require examination of the provisions of the Army Act and the rules and regulations made thereunder vis-à-vis the provisions of the Criminal Procedure Code, can be conveniently dealt with

together.

Capt.K.M.Saxena, learned counsel for the petitioner, would refer to Section 69 of the Army Act, and to the Criminal Courts and Courts-Martial (Adjustment of Jurisdiction) Rules, 1952 (hereinafter referred to as '1952 Rules') and to the Criminal Courts and Courts-Martial (Adjustment of Jurisdiction) Rules, 1978 (hereinafter referred to as '1978 Rules'), more particularly to Rule 3 thereof. According to the learned counsel, Section 69 of the Army Act read in conjunction with Rule 3 of the 1978 Rules would subject a soldier to the provisions of the Army Act and the rules made thereunder, only in places where either no Criminal Court is established or is not functioning and only if in such places an offence is alleged to have been committed, by a jawan, would the provisions of the Army Act apply. Learned counsel would submit that a person, subject to the provisions of the Army Act, is not deprived of his fundamental rights under Article 21 of the Constitution of India, he is entitled to be given the protection and the benefit of a free and fair trial as prescribed under the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'), and where the offence involved is one which can be tried by a competent criminal Court, the accused should only be tried under the Cr.P.C. and not under the Army Act, more so, when one of the parties to the criminal case is a civilian to whom the provisions of the Army Act and the rules made thereunder have no application. Learned counsel would contend that Section 69 of the Army Act supplements the provisions of the Cr.P.C. and does not supplant it.

Learned counsel would submit that since Section 70 of the Army Act specifically excludes "Rape" from being tried by a Court Martial and as the A.P. amendment to Section 354 I.P.C., brings it on par with Section 375 I.P.C., the offence under Section 354 I.P.C. must be read as one amongst the offences, under Section 70 of the Army Act, which are excluded from the purview of a Court Martial, and would rely on **UNION OF INDIA V. L.D.BALAM SINGH,** (Judgment in Crl.A.No.168 of 1999, dated 24.04.2002).

Learned counsel would contend that since the provisions of Cr.P.C. would apply for trial of offences under the I.P.C., the procedural safeguards in

the Cr.P.C. should also be extended when a person is tried under the provisions of the Army Act, which would include the concomitant right of being defended by counsel. Otherwise the provisions of the Army Act would be *ultra vires* and in violation of the fundamental rights guaranteed under part–III of the Constitution of India.

Sri Deepak Bhattacharjee, learned Standing counsel for the respondents, would submit that under Section 70 of the Army Act it is only for an offence of murder of a person not subject to military law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person would a person, who is subject to the provisions of the Army Act, not be liable to be tried by a court martial, unless the offence committed by such a person is (a) while on active service; or (b) at any place outside India; or (c) at a frontier post specified by the Central Government by notification in this behalf. Learned Standing counsel, while fairly conceding that none of the exceptions in (a) to (c) of Section 70 is applicable, would however, emphasise that the petitioner was charged for an offence, not of rape under section 375 I.P.C., but of assault or use of criminal force on a woman intending to outrage her modesty under section 354 I.P.C. Learned Standing counsel would submit that since an offence under Section 354 I.P.C. is not among those specified in Section 70 of the Army Act and as the petitioner is admittedly subject to the provisions of the Army Act he is liable to be tried by a court martial. Learned Standing counsel would refer to Section 5 Cr.P.C. and submit that the Army Act is a special law and since the provisions of Cr.P.C. are subject to the said special law, the provisions of the Army Act would prevail notwithstanding anything contrary thereto in the Cr.P.C. Learned Standing Counsel would make a detailed analysis of the provisions of the Army rules to contend that adequate safeguards are provided thereunder for trial of offences under I.P.C. read with Section 69 of the Army Act, and would rely on **MADAN LAL V. UNION OF INDIA**, and **V.VENKATESWARLU V. UNION OF INDIA** in this regard.

Before considering the rival submissions, it is necessary to refer to Sections 69 and 70 of the Army Act:

69. Civil Offences – Subject to the provisions of section 70, any person subject to this Act who at any place in or beyond India, commits any civil offence, shall be deemed to be guilty of an offence against this Act and , if charged with under this section, shall be liable to be

tried by a court-martial and, on conviction, be punishable as follows, that is to say,-

(a) if the offence is one which would be punishable under any law in force in India with death or with transportation, he shall be liable to suffer any punishment, other than whipping, assigned for the offence, by the aforesaid law and such less punishment as is in this Act mentioned; and

(b) in any other case, he shall be liable to suffer any punishment, other than whipping, assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned.

70. Civil Offences not triable by court-martial - A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried by a court-martial, unless he commits any of the said offences-

a. while on active service, or

b. at any place outside India, or

c. at a frontier post specified by the Central

Government by notification in this behalf"

Section 69 relates to Civil Offences. Civil Offences are defined, under Section 3(2), to mean an offence which is triable by a Criminal Court. Section 69 is subject to the provisions of Section 70 and for the offences specified in Section 70, Section 69 would not apply.

Would Section 354 I.P.C., as a result of its amendment by A.P. Act 6 of 1991, stand equated with Sections 375 & 376 I.P.C. and thereby a person charged with an offence under Section 354 I.P.C., be governed by the provisions of Section 70 and not Section 69 of the Army Act is the question which needs to be answered first.

Section 70 of the Army Act is specific, in that, only offences of murder, culpable homicide and rape of a person, not subject to military law, is excluded from the purview of a court martial.

Section 375 I.P.C. defines rape as follows:

“A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First- Against her will.

Secondly-Without her consent.

Thirdly-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly-With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly-With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly-With or without her consent, when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under “:fifteen” years of age, is not rape”

Sections 354, 376 and 376-D I.P.C. read as under:

“354. Assault or criminal force to woman with intent to outrage her modesty:

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”

Section 354, on its amendment by A.P. Act 6 of 1991, reads thus:

“ASSAULT OR CRIMINAL FORCE TO WOMAN WITH INTENT TO OUTRAGE HER MODESTY:-

Whoever assaults or uses criminal force to any woman intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine.

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term which may be less than five years, but which shall not be less than two years”

“376. Punishment for rape:

Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

PROVIDED that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,

a. being a police officer commits rape—

i. within the limits of the police station to which he is appointed; or

ii. in the premises of any station house whether or not situated in the police station to which he is appointed; or

iii. on a woman in his custody or in the custody of a police officer subordinate to him; or

b. being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

c. being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman’s or children’s institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

d. being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

e. commits rape on a woman knowing her to be pregnant; or

f. commits rape on a woman when she is under twelve years of age; or

g. commits gang rape,

shall be punished with rigorous imprisonment for

a terms which shall not be less than

PROVIDED that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten year.

Explanation 1: Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within he meaning of this sub-section.

Explanation 2:"Woman's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3: "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons required medical attention or rehabilitation.

"376-D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital:

Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position on and has sexual intercourse with any woman in that hospital, such sexual intercourse not amount to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine"

The offence of "Rape" is distinct from the offence of indecent assault. In order to constitute an offence under Section 354 I.P.C. there must be assault or use of criminal force on a woman with the intention or knowledge that the woman's modesty will be outraged. Indecent acts of assault, prior to sexual contact with the woman, would fall within Section 354 I.P.C. whereas an offence of rape under Sections 375 and 376 I.P.C would be the actual sexual contact itself (**State of Madhya Pradesh v. Babulal**)

Not withstanding the similarity of punishment prescribed for offences under Section 354 I.P.C., (A.P. Amendment Act 6 of 1991) and Section 376 I.P.C., the offence of assault or criminal force on a woman with the intention of outraging her modesty under Section 354 I.P.C. cannot be equated to rape under Sections 375 and 376 I.P.C. Section 376-D I.P.C. is an offence of intercourse by a member of the management or staff of hospital with any woman in that hospital not amounting to an offence of rape. Since Section 376-D, specifically excludes "rape", and since the petitioner has not been charged for an offence under Section 376-D I.P.C, the question as to whether an offence under Section 376-D is among the offences under Section 70 of the Army Act, excluded from the purview of a Court Martial, does not call for examination in this writ petition.

The offence of assault and use of criminal force on a woman, under Section 354 I.P.C, is neither pari materia with nor is it "rape" as defined under Section 375 I.P.C. It is a settled rule of statutory interpretation that where the words of a provision are clear and unambiguous, it is not for Courts to read something into the said provision, which is non-existent. In **Sakshi v. Union of India** the question which came up for consideration was whether, by a process of judicial interpretation, the provisions of Section 375 I.P.C. could be altered to include all forms of "penetration" and "sexual intercourse" within its ambit, and the Supreme Court held thus:

"It is well-settled principle that the intention of the legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also to what has not been said. As a consequence a construction which requires for its support addition or substitution of words or which results in rejection of words as meaningless has to be avoided. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. It is equally well settled that a statute enacting an offence or imposing a penalty is strictly construed. The fact that an enactment is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear. (Justice G.P. Singh: *Principles of Statutory Interpretation*, pp. 58 and 751, 9th Edn.)

Sections 354, 375 and 377 IPC have come up for consideration before the superior courts of the country on innumerable occasions in a period of almost one-and-a-half century. Only sexual intercourse, namely, heterosexual intercourse involving penetration of the vagina by the penis coupled with the explanation that penetration is sufficient to constitute sexual intercourse necessary for the offence of rape has been held to come

within the purview of Section 375 IPC. The wide definition which the petitioner wants to be given to "rape" as defined in Section 375 IPC so that the same may become an offence punishable under Section 376 IPC has neither been considered nor accepted by any court in India so far. Prosecution of an accused for an offence under Section 376 IPC on a radically enlarged meaning of Section 375 IPC as suggested by the petitioner may violate the guarantee enshrined in Article 20(1) of the Constitution which says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

The offence under Section 354 I.P.C. can neither be treated nor can it be read to be an offence under Section 375 and 376 I.P.C. for the purpose of excluding the jurisdiction of court-martials to such offences.

The contention that the provisions of the Army Act supplements and does not supplant the provisions of the Cr.P.C., cannot also be accepted. Section 4 and 5 of the Criminal Procedure Code reads thus:-

"Section-4: **Trial of offences under the Indian Penal Code and other laws**:- (1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences"

"**Section-5: -** Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force"

The conjoint effect of Sections 4(2) and 5 of the Criminal Procedure Code is that all offences, whether under the penal code or under any other law, have to be investigated, inquired into, tried and dealt with according to the provisions of the criminal procedure code. This rule is subject to the qualification that in respect of offences under other laws, that is to say, under laws other than the Indian Penal Code, if there be an enactment regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences, such a special enactment will prevail over the code of criminal procedure, unless there is a specific provision to the contrary. (**Sholapur Municipality Vs.**

R.V. Relekar; **S.P.Thiruvengadasami Naidu Vs. Municipal Health Office**; In re **Guruviah Naidu & Co.**)

Section 5 of the Cr.P.C. makes the provisions of the Code, subject to the provisions of any special law and since the Army Act is a special law, it is the Cr.P.C. which is subject to the provisions of the Army Act. The phrase 'subject to' subjects the provisions of the statute to the provisions of another. Where there is no clash, the phrase does nothing: If there is collision, the phrase shows what is to prevail.(**C & J Clark Ltd v. Inland Revenue Comrs**) . The words "subject to the provisions of the special law" in Section 5 would mean that if there is an irreconcilable conflict between the provisions of the Cr.P.C. and the provisions of the Special Law, the later shall prevail to the extent of the inconsistency. A provision of a special law, by its express terms, may come into conflict with a provision of the Cr.P.C. wholly or in part; the said provision in a special law may also by necessary implication, come into direct conflict with the provisions of the Cr.P.C. Whatever it may be, once inconsistency is spelt out, the provisions of the Special Law shall prevail. (**South India Corporation (P) Ltd. Vs. Secretary, Board of Revenue, Trivandrum**)

The relevant chapters of the Army Act embody a completely self contained comprehensive code specifying the various offences under the Act and prescribing the procedure for detention and custody of offenders, investigation and trial of offenders by Court Martial, the punishment to be awarded for various offences, confirmation and revision of sentences imposed by Court Martial etc. The Army Act is therefore a special law conferring special jurisdiction and powers on Court Martial and prescribes a special form of procedure for the trial of offences under the Army Act. The effect of Section 5 of Cr.P.C. is to render the provisions of Cr.P.C. inapplicable in respect of all matters covered by such special law. In **Ajmer Singh v. Union of India** , the Supreme Court held thus:

"AS we have already indicated, we are unable to accept as correct the narrow and restricted interpretation sought to be placed on Section 5 of the Code by the Counsel appearing on behalf of the appellants. In our opinion the effect of Section 5 of the Code is clearly to exclude the applicability of the Code in respect of proceedings under any special or local law or any special jurisdiction or form of procedure prescribed by any other law. Whatever doubt might otherwise have existed on this point is totally set at rest by Section 475 of the Code of Criminal Procedure which furnishes a conclusive indication that the

provisions of the Code are not intended to apply in respect of proceeding before the Courts-Martial. That Section is in the following terms :-

"475. Delivery to commanding officers of persons liable to be tried by Court-martial (1). The Central Government may make rules consistent with this Code and the Army Act, 1950 (46 of 1950), the Navy Act, 1957 (62 of 1957), and the Air Force Act, 1950 (45 of 1950) and any other law, relating to the Armed Forces of the Union, for the time being in force, as to cases in which persons subject to military, Naval or Air Force law, or such other law, shall be tried by a Court to which this Code applies or by a Court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the unit to which he belongs, or to the commanding officer of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a Court-martial.

EXPLANATION - In this section -

(A) "unit" includes a regiment, corps, ship, detachment, group, battalion or company,

(B) "court-martial" includes any tribunal with the powers similar to those of a Court-martial constituted under the relevant law applicable to the Armed Forces of the Union.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any unit or body of soldiers, sailors or airmen stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

(3) A High Court may, if it thinks fit, direct that a prisoner detained in any jail situated within the State be brought before a Court-martial for trial or to be examined touching any matter pending before the Court-martial."

THE distinction made in the Section between "trial by a Court to which this Code applies" and by a Court-Martial conclusively indicates that Parliament intended to treat the Court-Martial as a forum to the proceedings before (sic) the provisions of the Code will have no application"

Reliance placed on Rule 3 of 1978 Rules to contend that the provisions of the Cr.P.C. would prevail over the provisions of the Army Act, is also misconceived. Rule 3 of the 1978 rules, reads thus:

"Where a person subject to military, naval, air force or coast guard law or any other law relating to the Armed Forces of the Union for the time being in force is brought before a Magistrate and charged with an offence for which he is also liable to be tried by a Court Marital, or coast guard Court, such Magistrate shall not proceed to try such person or to commit the case to the Court of Session, unless:-

a. he is moved thereto by a competent military, naval, air force or coast guard authority; or

b. he is of opinion for reason to be recorded that he should so proceed or to commit without being moved thereto by such authority.

Rule 3, in fact, places a restriction on the Magistrate to deal with a person subject to military law. Even if a person, liable to be tried by a court-

martial, (such being the case of the petitioner herein), had been charged with an offence under Section 354 I.P.C. and brought before a Magistrate, Rule 3 of the 1978 Rules would require the Magistrate not to proceed further unless he is moved thereto by a competent military authority. Rule 3 places restrictions on the powers of Magistrates, and not on the competent authorities under the Army Act, in dealing with a person subject to the provisions of the Army Act. Rule 3 of the 1978 Rules does not support, and in fact runs contrary to, the submission of Capt.K.M.Saxena, Learned counsel for the petitioner, that since the offence under Section 354 I.P.C. can be tried under the provisions of Cr.P.C., the same offence cannot be tried by a court martial under the provisions of the Army Act. A person subject to the provisions of the Army Act can, at the discretion of the competent authorities, be prosecuted either under the provisions of the Army Act or the Criminal Procedure Code. In the present case the competent authorities, in having chosen to prosecute him under the provisions of the Army Act, cannot be said to have acted without jurisdiction.

The next contention which is required to be examined is if one of the parties to the criminal case is a civilian, are the provisions of the Army Act not applicable? Both Sections 69 and 70 are attracted where a person, subject to the provisions of the Army Act, commits a civil offence. The petitioner herein is admittedly subject to the provisions of the Army Act. “Civil Offence” is defined under Section 3(2) of the Army Act, to mean an offence, which is triable by a Criminal Court. Since the offence, under Section 354 I.P.C., is an offence which can be tried by a Criminal Court, it is a civil offence for which the respondents are entitled to take action under Section 69 of the Army Act. No provision, of the Army Act or rules made thereunder, which disentitles the competent authority from receiving a complaint from a civilian, provided the offence alleged to have been committed is by a person who is subject to the provisions of the Army Act, has been brought to the notice of this Court. As long as the person, accused of an offence, is subject to the provisions of the Army Act, it is of no consequence that the victim is not subject to the provisions of the Army Act since prosecution is of the offender for having committed an offence on the victim.

The power conferred under Section 69 of the Army Act is not restricted only to cases where there is no criminal court in existence or a criminal court

has not been established. The power is wide enough to bring within it every person, who is subject to the provisions of the Army Act and who commits an offence triable by a criminal court provided, of course, that the offences are not those which fall under Section 70 of the Army Act. The existence or absence of Criminal Courts at the place at which the offence is committed is of no consequence and the person, who commits a civil offence and who is subject to the provisions of the Army Act, can be tried by a court martial for an offence under Section 69 of the Army Act. Even for offences of murder, culpable homicide not amounting to murder and rape against a civilian the prohibition against being tried by a Court Martial would not apply in situations where clauses (a) to (c) of Section 70 of the Army Act are attracted.

The next question which arises for consideration is whether the army authorities are entitled to entertain the complaint received from a civilian, even if it be for an offence under the I.P.C. Capt.K.M.Saxena, learned counsel for the petitioner, would submit that the provisions of the Army Act would apply only to cases where both parties to the criminal case are subject to the provisions of the Army Act and not in cases where one of the parties is a civilian. Learned counsel would also submit that a complaint for an offence under the I.P.C. has necessarily to be lodged either before a police station or a Magistrate under Section 156 Cr.P.C., within whose jurisdiction, the offence is committed, and that Army authorities are not entitled to receive any such complaint as that would amount to their usurping the powers conferred on police officials and on Magistrates under the Cr.P.C. This submission cannot be accepted, for the reason that the provisions of Cr.P.C. which deal with the manner of investigation, the manner in which complaints are to be lodged before police officials or Magistrates etc., are all, under Section 5 thereof, subject to the provisions of special laws. Since the Army Act is a special law, the provisions of the Cr.P.C., would be subject to the provisions of the Army Act, and in case of inconsistency will not prevail.

The provisions of the Army Act apply to offences committed by army personnel described in S. 2 of the Act; it creates new offences with specified punishments, imposes higher punishments to pre-existing offences, and enables civil offences by fiction to be treated as offences under the Act; it provides a satisfactory machinery for resolving the conflict of jurisdiction.

(**Major E.G.Barsay v. State of Bombay**). Under Chapter VI of the Army Act there are three categories of offences, namely, (*1*) offences committed by a person subject to the Act triable by a Court Martial in respect whereof specific punishments have been assigned; (*2*) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court Martial; and (*3*) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by Court Martial, but are triable only by ordinary criminal courts. The legal position therefore is that when an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37 etc., it would be exclusively triable by a Court Martial; but where a civil offence is also an offence under the Army Act or deemed to be an offence under the Army Act, both an ordinary Criminal Court as well as a Court Martial would have jurisdiction to try the person committing the offence. Such a situation is visualized and provision is made for resolving the conflict under Sections 125 and 126 of the Army Act. (**Som Datt Datta v. Union of India**)

In this context reference may be made to Section 125 of the Army Act which reads thus:

"Section 125: Choice between criminal court and court-martial:- When a criminal court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed to decide before which court the proceedings shall be instituted, and, if that officer decides that they should be instituted before a court-martial, to direct that the accused person shall be detained in military custody"

In respect of offences, which could be tried both by a criminal Court as well as a Court-martial, Sections 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-martial. Section 125 presupposes that in respect of an offence both a Criminal Court as well as a Court Martial have each concurrent jurisdiction. Such a situation can arise in a case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the

Army Act. In the first instance, discretion is left to the officer mentioned in Section 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a court-martial, that the accused is detained in military custody. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-Martial, the Army Act would not be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law. {**Joginder Singh Vs. The State of Himachal Pradesh; Som Datt Datta** (13 supra)} .

The discretion conferred on the authorities to choose the manner in which the accused is required to be tried, is not unfettered but is circumscribed by other provisions of the Act. While under Section 120 (1), the summary court-martial is empowered to try any offence punishable under the Army Act, such a power is subject to the sub-section (2). Under Section 120(2), when there is no grave reason for immediate action and reference can, without, detriment to discipline, be made to the officer, empowered to convene a district court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try, without such reference, any offence punishable under Section 69 of the Army Act. Trials in ordinary general courts are bound to take longer, on account of the procedure for trials and consequent appeals and revision, than trials by Court Martial. The necessities of the service in the army require speedier trial. Sections 102 and 103 of the Act point to the desirability of the trial by Court Martial to be conducted with as much speed as possible. Section 120 provides that subject to the provisions of sub-section(2), a summary Court Martial may try any of the offences punishable under the Act and sub-section (2) indicates that reasons for immediate action and detriment to discipline are factors in deciding the type of trial. There could be a variety of circumstances which may influence the decision as to whether the offender be

tried by a Court Martial or by an ordinary criminal court, and therefore it becomes inevitable that the discretion to make the choice as to which Court should try the accused be left to responsible military officers under whom the accused be serving. Those officers are to be guided by considerations of the exigencies of the service, maintenance of discipline in the army, speedier trial, the nature of the offence and the person against whom the offence is committed. **(Ram Sarup v. Union of India).**

In the present case, a decision was taken by the Sub-Area Commander that the proceedings should be initiated before a Summary Court Martial. Consequently the petitioner was detained in military custody. The discretion exercised by the designated officer to have the proceedings instituted before a Summary Court Martial would, in effect, prohibit the Criminal Court from exercising its ordinary jurisdiction in the manner provided under the Criminal Procedure Code to try the offence under Section 354 I.P.C. against the petitioner herein.

Capt.K.M.Saxena, learned counsel for the petitioner, would submit that restrictions on fundamental rights must be limited only to those prescribed in Chapter IV of the Army rules and since the restriction prescribed under Chapter IV does not exclude the right to be defended by counsel this right cannot be restricted by the provisions of the Army Act and the rules made thereunder. Accepting this submission would necessitate certain provisions of the Army Act and the Rules made thereunder being declared ultra vires Part III of the Constitution. In this writ petition, there is no challenge to the Constitutional validity of the provisions of the Army Act or any of the rules made thereunder as violating the fundamental rights guaranteed in Part III of the Constitution of India. As held in **M.L.Kamra Vs. New India Assurance Company Ltd.**, there is a presumption about the constitutionality of statutory provisions and rules. In the absence of a specific challenge to its vires, it is not open for this Court, normally, to adjudicate upon the constitutionality of statutory provisions on the touchstone of Part III of the Constitution of India.

Article 33 of the Constitution of India empowers Parliament to determine to what extent any of the rights conferred by Part III shall, in their application to the members of the Armed forces, be restricted or abrogated so as to ensure

the proper discharge of duties and maintenance of discipline amongst them. The Army Act is a law made by Parliament and if any provision thereof tends to affect the fundamental right under Part III of the Constitution, that provision does not, on that account become void, as it must be taken that Parliament has thereby, in the exercise of its power under Article 33 of the Constitution, made the requisite modification to affect the respective fundamental right. **(Ram Sarup -** 15 supra**)**. In **PRITI PAL SINGH V. UNION OF INDIA**, it was held that the Army Act is a law made by the Parliament under Article 33 of the Constitution of India and every provision of the Army Act, if in conflict with the fundamental rights conferred by Part III, shall have to be read subject to Article 33, as being enacted with a view to either restrict or abrogate fundamental rights to the extent of inconsistency or repugnancy between Part III of the Constitution and the Army Act. The Division Bench of this Court in **V.VENKATESWARLU** (3 supra), following **PRITI PAL SINGH** (17 supra) held that the procedure prescribed under the Army Act and rules made thereunder, even if it is different from the normal procedure for the trial and punishment of civilians under the Cr.P.C., would still prevail notwithstanding the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India. The contention, that the provisions of the Army Act must be read subject to Cr.p.C., as otherwise it would amount to usurpation of the powers conferred on police officials and Magistrates under the Cr.P.C., must therefore fail.

Capt. K.M.Saxena, learned counsel for the petitioner, would refer to **L.D.BALAM SINGH's** (1 supra) wherein the Supreme Court, after referring to **PRITI PAL SINGH** (17 supra) and the scope and extent of Article 33 of the Constitution of India, held thus:

"While it is true that Army personnel ought to be subjected to strictest form of discipline and Article 33 of the Constitution has conferred powers on to the Parliament to abridge the rights conferred under Part III of the Constitution in respect of the members of the Armed Forces, but does that mean and imply that the Army Personnel would be denuded to the Constitution privileges as guaranteed under the Constitution ? Can it be said that the Army Personnel form a class of citizens not entitled to the Constitution's benefits and are outside the purview of the Constitution? To answer above in the affirmative would be a violent departure to the basic tenets of the Constitution. An Army Personnel is as much a citizen as any other individual citizen of this country. Incidentally, the provisions as contained as Article 33 does not by itself abrogate any rights and its applicability is dependent on Parliament legislation. The language used by the framers is unambiguous and categorical and it is in this perspective Article 33 may be noticed at this juncture. The said Article reads

as below:-

"33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc., - Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,-

a. the members of the Armed Forces; or

b. the members of the Forces charged with the maintenance of public order;or

c. persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or

d. persons employed in, or in connection with, the telecommunication system set up for the purposes of any Force, bureau or organization referred to in clause (a) to (c) be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them."

2. A plain reading thus would reveal that the extent of restrictions necessary to be imposed on any of the fundamental rights in their application to the armed forces and the forces charged with the maintenance of public order for the purpose of ensuring proper discharge of their duties and maintenance of discipline among them would necessarily depend upon the prevailing situation at a given point of time and it would be inadvisable to encase it in a rigid statutory formula. The Constitutions makers were obviously anxious that no more restrictions should be placed than are absolutely necessary for ensuring proper discharge of duties and the maintenance of discipline amongst the Armed Force Personnel and therefore Article 33 empowered the Parliament to restrict or abridge within permissible extent, the rights conferred under Part III of the Constitution in so far as the Armed Force Personnel are concerned. (In this context reference may be made to the decision of the Supreme Court in the case of B.Viswar & Ors. Vs. Union of India & Ors. reported in AIR 1983 S.C. 658) as also a judgment of the Calcutta High Court in the case of Ltd. Col. Amal Sankar Bhaduri vs. Union of India & Ors. (1987 CLT 1)".

In **L.D.BALAM SINGH's** (1 supra), a special enactment under the NDPS Act came up for consideration before Supreme Court. It is in this context that it was held that if a particular statute is taken recourse to, the question of trial under another statute without taking recourse to the statutory safeguards would be void, the entire trial would stand vitiated and unless there existed specific provisions in the particular statute, the statutory provisions framed under the NDPS Act was required to be followed.

In the present case, however, the offence of which the petitioner was charged under Section 354 I.P.C., the right to a fair trial claimed by the petitioner is under the provisions of the Cr.P.C. which, as stated supra, has been made subject to the provisions of a special law and since the Army Act is

one such special law, the provisions of Cr.P.C., including the safeguards and rights prescribed thereunder, would be subject to the provisions of the Army Act.

Capt.K.M.Saxena, learned counsel for the petitioner would submit that the petitioner has challenged the vires of Section 69 of the Army Act and the 1954 rules in another writ petition which is not listed before this Court. Suffice to state that since the constitutional validity or otherwise of the Army Act and the rules made thereunder is not in issue in the writ petitions before this Court, this question does not call for further examination.

Now, the question as to whether the petitioner should have been tried by a Summary Court Martial instead of a general Court Martial.

Capt.K.M.Saxena, learned counsel for the petitioner, would refer to Sections II and III of the Army Rules 1954 to submit that while under Rule 96, in every general and district courts-martial, counsel can appear on behalf of the accused, such a right is denied to the accused in the case of a summary court martial and under Rule 129 of the 1954 Rules, an accused can have a person to assist him during the trial, whether a legal advisor or any other person, and the person so assisting him may advise him on all points and suggest the questions to be put to witnesses, but shall not examine or cross-examine witnesses or address the court in a summary court martial. Learned counsel would submit that the summary Court Martial restricts legal defence of an accused even in cases involving complicated questions of fact and law, the accused is merely entitled to have the assistance of a counsel as his friend and the counsel is not entitled for an audience. In a General Court Martial, however, an accused is given the right to be defended by Counsel.

Learned counsel would further submit that the provisions of the Army Act confers unfettered and unguided discretion on the competent authorities to choose the form of a court martial and thereby deny the accused the right of fair trial including the right of being defended by counsel. He would submit that the competent authorities, under the Army Act, could well choose the procedure of a Summary court martial, even in cases where the offences are liable for

punishment in excess of the period of one year (the maximum sentence which a summary court martial is entitled to impose), only to deny the accused the right of being defended by counsel.

Chapter X of the Army Act relates to Court Martial and Section 108 of the Army Act prescribes the kinds of courts-martial to include, under clause (d), a summary courts-martial. Section 116(1) provides that a summary court-martial may be held by the commanding officer of any corps, department or detachment of the regular Army, and he shall alone constitute the Court. Under Section 116(2), the proceedings shall be attended throughout by two other persons who shall be officers or junior commissioned officers or one of either, and who shall not be sworn or affirmed. Under Section 118 a general or summary court-martial shall have power to try any person, subject to the provisions of the Army Act, for any offence punishable therein and to pass any sentence authorised thereby. Under section 119 a district court-martial shall have power to try any person subject to the provisions of the Army Act other than an officer or a junior commissioned officer for any offence made punishable therein, and to pass any sentence authorized by the Act other than the sentence of death, transportation, or imprisonment for a term exceeding two years.

Section 120 of the Army Act relates to powers of summary courts-martial and reads thus:-

(1) Subject to the provisions of sub-section (2), a summary court-martial may try any offence punishable under this Act.

(2) Where there is no grave reason for immediate action and reference can without detriment to discipline be made to the officer empowered to convene a district court-martial or on active service a summary general court-martial for the trial of the alleged offender, an officer holding a summary court-martial for the trial of the alleged offender, an officer holding a summary court-martial shall not try without such reference any offence punishable under any of the sections 34, 37 and 69 or any offence against the officer holding the Court.

(3) A summary court-martial may try any person subject to this Act and under the command of the officer holding the court, except an officer, junior commissioned officer or warrant officer.

(4) A summary court-marital may pass any sentence which may be passed under this Act, except a sentence of death or transportation, or of imprisonment for a term exceeding the limit specified in sub-section (5).

(5) The limit referred to in sub-section (4) shall be one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months, if such officer is below that rank."

Under Section 120(1) a summary court-martial may try any offence punishable under the Act, which would include an offence punishable under Section 69 of the Army Act read with Section 354 I.P.C. This power to try any offence is, however, subject to sub-section (2). Under Section 120(5), the maximum sentence which can be imposed by a court martial is limited to one year if the officer holding the summary court-martial is of the rank of lieutenant-colonel and upwards, and three months, if the officer is below such rank.

It is no doubt true that a Sepoy or Jawan, like the petitioner herein, who is charged of an offence under Section 354 I.P.C. read with Section 69 of the Army Act, can be tried either by a general court-martial or a summary court-martial. The wide discretion, conferred on the competent authorities, to decide the mode and manner in which an accused is to be tried, has serious consequences inasmuch as for an offence punishable with imprisonment for seven years, the competent authority, instead of having the accused tried by a general or district court-martial could well choose to have him tried by summary court-martial, thereby denying him the right of being defended by counsel and giving him only the limited assistance of a friend of the accused which he is entitled to in a summary court-martial.

The procedure to be followed by a Court Martial is quite elaborate and generally follows the pattern of the procedure under the Code of Criminal Procedure. There are however, material differences too. All the members of the Court Martial are Military Officers who are not expected to be trained Judges, as the presiding officers of criminal courts are. No Judgment is recorded. The authorities to whom the convicted person can represent, against his conviction by a Court Martial, are also non-judicial authorities. In the circumstances, a trial by an ordinary criminal court would be more beneficial to the accused than one by a Court Martial. There are several provisions in the Army Act which indicate the policy which is to be a guide for exercising the discretion and it is expected that the discretion is exercised in accordance with it. **(Ram Sarup -** 15 supra**)**

In the present case, the officer holding the summary court-martial (Colonel K.R.Nair) made a reference to the Sub-Area Commander (the Officer empowered to convene a district court-martial). The Sub-Area Commander, Sri U.W.Deshmukh, sought the advice of the Deputy Judge Advocate General at the GOC, Southern Command, Pune, and on his recommendation that a summary court-martial be convened, the Sub-Area Commander accorded sanction for a summary court-martial to be held. It is only thereafter that the summary court-martial was proceeded with by Colonel K.R.Nair. The requirements of Section 120(2) of the Army Act has been complied with in the present case.

Capt.K.M.Saxena, learned counsel for the petitioner, would, however, submit that the provisions of Section 120(2) have to be given a restricted meaning and a reference, made to the officer empowered to convene a district court martial, would mean that the officer, who is empowered to hold the summary court-martial and who has made the reference, is of the view that the case is required to be tried only by a district court martial or by a general court-martial, more so, since the reference is for offences punishable under Section 34, 37 and 69 of the Army Act. While the submission is no doubt attractive, such a construction cannot be accepted even on a plain reading of the provision. The only requirement, under Section 120(2) of the Army Act, is that a reference should be made in cases where there is no grave reason for immediate action and where a reference can be made without detriment to discipline. The reference is required to be made to the officer empowered to convene a district court-martial and it is for that officer to decide whether a district court-martial should be convened or the offence should be tried by the summary court-martial itself. Accepting the interpretation sought to be placed, on Section 120(2) of the Army Act, by Capt.K.M.Saxena, learned counsel for the petitioner, could well result in a situation where an officer of lower rank, empowered to hold a summary court-martial, restricting the discretion conferred on the higher officer, empowered to convene the district court-martial, and by a mere reference direct that the offence be tried either by a district court-martial or a general court-martial and not a summary court martial. The analogy of committal proceedings and the matter being referred by a Magistrate to the Sessions court is not apposite. Section 120(2) of the Army

Act merely requires a reference to be made and does not circumscribe the power of the officer, empowered to convene a district court-martial to decide whether or not a summary court-martial should be convened in this regard.

In any event, since the vires of Section 120 of the Army Act is not in issue, in the absence of any challenge thereto in these writ petitions, this question does not call for any further examination.

QUESTION:(j) - Whether there was any infirmity in the procedure adopted by the Army Authorities in the case of the petitioner which strike at the very roots of concept of fair trial?

Capt.K.M.Saxena, learned counsel for the petitioner, for the first time before this Court raises several grounds relating to the manner in which the summary court-martial proceedings were conducted against the petitioner. In the absence of any plea in this regard, these questions of fact cannot be examined in the present writ petition. The amendment petition, in WPMP.No.2495 of 2005, is restricted only to a challenge to the punishment imposed and in the absence of facts being pleaded as to how the procedure prescribed for a summary court-martial has not been followed, this question does not call for further examination.

W.P.No. 9189 of 2004 fails and is accordingly dismissed. As a result of the dismissal of the writ petition, the interlocutory order passed, pending the writ petition, would no longer survive.

Now the contempt case in C.C.No.23 of 2005.

Contempt jurisdiction has to be exercised with scrupulous care and caution, restraint and circumspection. Recourse to this jurisdiction must be had wherever it is found that something has been done which tends to affect the administration of justice or which tends to impede its course or tends to shake public confidence in the majesty of law and to protect and maintain the dignity of the Court and the like situations. The respect for judiciary must rest on a

more sure foundation than recourse to contempt jurisdiction. (**Chetak Constructions Ltd. v Omprakash**). Contempt proceedings, as is well known, are quasi-criminal in nature and it is only if the violation is wilful and deliberate, can it be said that contempt has been committed. (**Indian Airport Employees Union v. Ranjan Chatterjee**; **Om Prakash Jaiswal v. D.K.Mittal**). The degree of proof required to establish contempt is of a high order and, akin to criminal proceedings, is proof beyond reasonable doubt.(**Chotturam v. Urvasi Gulal**; **Mrityunjoy Das v. Syed Habibur Rehman**)

The order, violation of which is alleged to be in contempt of this Court, is the order in W.P.M.P.No.11806 of 2004 in W.P.No.9189 of 2004 dated 18-5-2004, which reads as under :

"Post the W.P.M.P. on 16-6-2004. In the meanwhile, the respondents are directed not to pass any final orders"

The order merely requires the respondents not to pass any final orders. Despite the petitioner having been imposed the sentence of being reduced in rank, dismissed from service, to suffer rigorous imprisonment for nine months, and that the sentence be carried out by confinement in civil prison, the order has not implemented in view of the interim order passed by this court.

I do not see any reason to hold that the respondents have committed contempt of Court. Capt.K.M.Saxena, learned counsel for the petitioner, would submit that contempt has to be seen in the light of the order passed in the WPMP.No.11806 of 2004, and that the final order which the respondents were precluded from passing, was an order convening the summary court-martial itself or proceeding thereunder. The order in W.P.M.P.No.1806 of 2004 does not prohibit a summary court-martial from being proceeded with, and merely requires no final order to be passed. In any event, since violation of orders of this Court, in order to constitute contempt, must be willful and deliberate, an order, possible of two different views, cannot be said to have given rise to contempt necessitating respondents to be prosecuted in this regard. The contempt case in C.C.No.23 of 2005 is therefore dismissed.

Question (a): Whether there is any rationale in denying to the petitioner his right to Annual Leave / Casual Leave to enable him attend to his ailing mother?

Now W.P.No.20283 of 2005, wherein the relief sought is for grant of

leave, to which the petitioner was entitled to, of sixty days. The stand of the respondents, though no counter

affidavit is filed, is that in the absence of any specific provision for grant of leave, pending imposition of punishment, the leave sought for by the petitioner cannot be granted. Cap.K.M.Saxena, learned counsel for the petitioner, has also not referred to any rule or regulation, whereunder the petitioner, in the facts and circumstances of the present case, would be entitled for leave. In any event, in view of the orders now passed dismissing W.P.No.9189 of 1994, the sentence imposed would disentitle the petitioner from availing leave which he had sought. W.P.No.20283 of 2005 also fails and is accordingly dismissed.

Capt.K.M.Saxena, learned counsel for the petitioner, would make an oral request to suspend these orders till writ appeals are preferred. The offence, which stands proved in the summary court material and for which sentence is imposed, is of outraging the modesty of a lady patient by a staff member of a military hospital. I see no reason, therefore, to suspend the order dismissing the writ petitions. The oral request is rejected.

Both the writ petitions and the contempt case fail and are accordingly dismissed. There shall however be no order as to costs.

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29.09.2005

Note:

L.R. copy be marked

B/o

usd/asp

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WRIT PETITION NOS. 9189 OF 2004, 20283 OF 2005 AND C.C.NO.23 OF 2005

DATE: 29.09.2005